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No. 579.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

HARRY PORETSKY, ARTHUR W. MACHEN, Trustee, and THOMAS MACHEN,
Petitioners,

vs.

JULIUS H. WOLPE ET AL., and CHARLES W. KUTZ ET AL., as Members of the Zoning Commission of the District of Columbia,
Respondents.

OPPOSING BRIEF OF RESPONDENTS, JULIUS H. WOLPE ET AL., TO PETITION FOR WRIT OF CERTIORARI

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INDEX OF CASES.

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Concise Statement of Case

The judgment of the Appellate Court reversed the District Court and remanded the cause for further proceedings (Rec. 88).

The petitioner, Poretsky, brought suit to enjoin members of the Zoning Commission from carrying into effect a zoning order, which prohibited an apartment house at the corner of 16th and Shepherd St., N. W. The trial court

found the action of the Zoning Commission arbitrary, capricious and void (Rec. 55), and enjoined it (Rec. 56). Wolpe et al. were not parties to this proceeding.

These parties would have been seriously injured by the proposed erection of the apartment house on the land rezoned, and filed a motion for leave to intervene for the purpose of moving for a new trial, or, in the alternative, for the purpose of taking an appeal (Rec. 57).

The trial court denied the motion for intervention (Rec. 78), and the Court of Appeals reversed this order (Rec. 87).

Further Statement of Case

The petitioner, Poretsky, was the plaintiff in the trial court. He alleged himself to be a contract purchaser (not title owner) of parcel 70/100 in the City of Washington, District of Columbia, located at the southwest corner of 16th and Shepherd Streets, N. W. (page 3, petition for certiorari, 13-14 and 15 of record).

He desires to build an apartment house on such site, and brought this proceeding to compel the Zoning Commission to change its zoning so that he could do so. The respondents, Wolpe et al., are the owners of residences located west and north of parcel 70/100, the Piney Branch Parkway arm of Rock Creek Park being to the south and east.

The relative locations of the parties are shown by a diagram (Rec. 67).

If the judgment of the trial court stands, the erection of an apartment house will be permitted at the corner of 16th and Shepherd Streets, that will utterly destroy the esthetic features and impair the financial value of the homes owned by the respondents.

The members of the Zoning Commission were the defendants in the original proceeding. The Corporation Counsel and his assistants appeared for them.

Leave to intervene was sought by and granted to Arthur W. Machen, trustee, and to Thomas Machen, who were

vendors to Poretsky. They adopted the allegations of the plaintiff, and prayed for a similar judgment (Rec. 27). Their interest in the trial was hostile to the interests of these respondents.

Representatives of the respondents had offered to the Corporation Counsel their services in defending the action. He did not avail himself of that offer. Without the knowledge of or consultation with the respondents, a stipulation of facts was signed by the Corporation Counsel, which was erroneous. The case was then tried without a conference with the respondents, and not one of these respondents was called as a witness by the Corporation Counsel (Rec. 57 to 65).

Following that trial, the court wrote an opinion (Rec. 44-46) and subsequently entered findings of fact (Rec. 46 to 55) and judgment (Rec. 56). This judgment would ruin the present residential character of the neighborhood.

These respondents sought to intervene (Rec. 57 et seq.), and on May 6, 1943, filed a motion for leave to intervene, accompanied by a copy of petition to intervene. (See stipulation of appendix.)

The prayers of the petition were that the judgment of April 7, 1943, be vacated and held for naught, and that the petitioners be granted a new trial of the issues, or, in the alternative, that petitioners be granted the right to intervene for the purpose of appealing said cause, and that the original parties be required to deposit the necessary exhibits and record to effectuate an appeal (Rec. 64 and 65). The motion for leave to intervene was denied by the trial court on May 21, 1943 (Rec. 78), and this order was reversed by the Court of Appeals, and the cause remanded for further proceedings in the District Court.

The trial court held, in the findings of fact, that the action of the Zoning Commission in rezoning parcel 70/100 on November 7, 1941, was "unreasonable, arbitrary, capricious and void and should be vacated, set aside and held for naught" (Rec. 55).

This finding may be regarded as basic.

In order to illustrate the nature of the finding, the National Park and Planning Commission has furnished these respondents certain zoning maps, copies of which are attached hereto, demonstrating the facts, either as shown in the evidence, or which will be shown in the evidence more clearly by these respondents, if they are permitted to offer testimony.

Map I shows zoning on February 1, 1926, at a time when the area in which the respondents' homes are located, known as the Crestwood area, was totally undeveloped.

The court will note that as of that date only a strip along the 16th Street side of 70/100 was zoned to permit an apartment house, and that such apartment house site was in area C—not A. The court will also notice that as of that time Piney Branch Parkway had not been enlarged, so as to abut on the parcel in question, nor extended to the west of the parcel in question, nor has it been extended east of 16th Street.

Map II shows the zoning status as it was on November 7, 1941, as the result of the action of the Zoning Commission, which the court below subsequently held arbitrary and capricious.

The court will note that as of that date, Piney Branch Parkway had been enlarged, so that it abutted parcel 70/100. The court will also note that Piney Branch Parkway had been enlarged as of that date to the east side of 16th Street, and that no apartment house was permitted by law to be erected either on the east or west side of 16th Street north of Piney Branch Parkway, except in the small triangle made by 16th Street and Arkansas Avenue, where it was impracticable to erect an apartment house, even if this site had properly been zoned for an apartment house. (Par. 21 Proposed Intervening Petition, Rec. 60-61.)

Map III shows the situation on April 7, 1943, which was created by the judgment of the trial court (Rec. 56). Parcel 70/100 is there zoned A, thereby permitting the erection of an apartment house in a single family dwelling area.

This is "spot zoning," which does violence to the fundamental principles of zoning.

The only areas shown on the maps where an apartment house may be erected are A (colored purple), B (colored orange), C (colored blue). Zone D is not involved in any property shown on the maps. Zone B (colored orange) is already completely built up, as is shown by proposed intervening petition (Rec. 61). Under the zoning regulations, apartment houses cannot be built in A-Restricted, A-Semi-Restricted, or B-Restricted areas.

These facts do not seem to have been clearly presented to the trial court, as they might have been, by the original defendants, and this is one of the reasons why these respondents sought to intervene.

Prior to the changing of zoning 70/100 in 1941, a minority report was filed by the Zoning Advisory Council, in which it was said, "The present apartment house zoning of this 2.07-acre tract at 16th and Shepherd is by no stretch of the imagination a part of any comprehensive plan as the zoning law required. It is in fact an outstanding case of 'spot zoning' and constitutes an opening wedge for further apartment house zoning north of this point." The entire minority report is attached hereto (Exhibit IV) as an indication of what the respondents can show if they are permitted to offer evidence in the trial court. John Nolen, Jr., who signed the report, is director of planning for the National Capital Park and Planning Commission.

On April 19, 1943 (after the decision in the trial court), the National Capital Park and Planning Commission wrote a letter to the Zoning Commission, in which it said, "In the opinion of the Commission, this decision constitutes a definite threat to the principles of comprehensive zoning and city planning, and to the powers of the Zoning Commission to make changes in the zoning plan from time to time as conditions change in the various parts of the city. The Commission urges that all practical means be adopted to obtain a reversal of this decision."

Copy of this letter is attached as Exhibit V. The respondents proffer to prove the facts related in this letter, if they are permitted to offer evidence. The stenographic record of the testimony in the trial court has never been made available to these respondents, because of the refusal of counsel for Poretsky to accede to their demands for a copy, although they paid for it (Rec. 64).

The Situation of the Parties on the Record

The contract by which Poretsky purchased the property has certain parts deleted (Rec. 13). The deleted part read, "And that said property is now zoned 60-A area and will continue to be zoned as such until date of settlement, otherwise, this offer shall be null and void and deposit shall be returned to purchaser" (Rec. 26 and 42). It seems a fair comment to say that this deletion was because Poretsky knew there was likelihood of a controversy about the zoning, and bought the property on a chance. Nowhere in the pleadings is it contended that he ever complied with his contract and completed the purchase in accordance with it.

The Machen intervening petition explained this deletion as follows:

> "The Petitioners, however, insisted upon striking out said clause, as was done before the contract was executed. They told the purchaser that he must satisfy himself as to the zoning" (Rec. 26).

The court may readily find from these facts, it is submitted, that Poretsky took a chance on the zoning, and now, aided and abetted by the Machens, seeks to capitalize that chance at the expense of the neighboring property owners and to the detriment of the orderly development and planning of the nation's capital.

The petition for certiorari (pages 3 and 4) states that the motion for leave to intervene was not accompanied by the proposed intervening petition, but the said petition

was filed on May 8, 1943. The printed record shows May 8th. Nothing was said by the petitioners in the briefs in the Court of Appeals or in the argument about this date, or else their attention would have been called to the fact that this date is a printer's error, caused by the indistinctness of the rubber stamp imprinting the filing date on the record. The motion for leave to intervene (Rec. 57) recites, "This motion is accompanied by petition setting forth the claim of these petitioners," and the docket in the trial court shows that the petition was filed along with the motion, and that its date was May 6. The attention of counsel for Poretsky has been called to this error, and counsel preparing this brief is happy to include as Exhibit VI hereto a stipulation reached with counsel for the other parties showing that the correct date of filing the petition for intervention was May 6, 1943.

The Right to Intervene

Much of the argument of the petitioners is based on the theory that it was necessary for respondents to have some ownership interest in the property in parcel 70/100, or that their property be adjoining or contiguous, and that without such ownership or adjoining or contiguous property, the respondents would have no interest sufficient to enable them to intervene.

Respondents respectfully submit that this is a strained construction of the law. The fact that 17th Street separated the properties of the respondents from the proposed apartment site does not make the proposed apartment house less objectionable than it would be if it were in the same block. Of course the respondents could not be in the same block, because 70/100 occupies the entire block.

If only a person with abutting property had a right to be heard in a zoning matter, then it would be possible for the owner of three adjoining lots to make whatever use

he chose of the center lot. The absurdity of such a position is apparent.

The appellate court answered this contention with a number of cases cited (R. 87) where the question of the right to intervene was considered under various phases where there was no ownership or adjoining or contiguous property in the sense in which petitioners have used those terms.

That these respondents have an interest is proved by the acts of Congress relating to zoning for the District of Columbia, in offering them an opportunity to be heard in any zoning case before the Zoning Commission and in giving them a right to enjoin any violation, etc.

The Court of Appeals made a careful analysis of the zoning law in determining the right of Wolpe et al. to intervene (Rec. 86 and 87). The respondents do not believe there is any need to burden this court by adding to it.

The petitioners say, with respect to F. R. C. P. 24, "The basic principle underlying the rule is that the intervener shall have a direct and immediate legal interest in the property which is the subject matter of the action."

This Court said in *Security and Exchange Commission* v. *United States Realty and Improvement Co.*, 310 U. S. 459, 84 L. Ed. 1306, in speaking of F. R. C. P. 24:

> "This provision plainly dispenses with any requirement that the intervener shall have a direct personal or pecuniary interest in the subject of the litigation."

The petitioners seem to be in conflict with the doctrine of this court on this subject.

The petitioners rely on *U. S.* v. *California Co-operative Canneries*, 279 U. S. 553, 73 L. Ed. 838 (cited in petition, pages 7-9-21) as embracing contrary doctrine. This case was decided by this court before the passage of the Federal rules, and the only part germane to this controversy is a statement to the effect that the court below did not refer to

the decisions which hold that an order denying leave to intervene is not appealable, except where he who seeks to intervene has a direct and immediate interest in the res which is the subject of the suit. That does not seem to these petitioners to meet the issue here, for the question arises, "What is the res?" It certainly need not be a proprietary or titular right. The res in the case at bar is not the ownership of the property, for indeed Poretsky has not such ownership. He claims the right as a contract purchaser to erect an apartment house in contravention of the rights of the public and in contravention of the rights of these respondents.

The *Canneries* case was one under the anti-trust act, while the present is under the Zoning Law of the District of Columbia. Whatever else may be said about it, it remains that the case was before the present Federal rules were adopted, and did not establish that the res was not the thing or right which these respondents claim.

There is no property right in a zoning status, and neither Poretsky nor the Machens could deprive the government of its police powers, including the power to rezone real estate.

A zoning status is not the equivalent of a covenant running with the land. The Machens, owners of 70/100, can not say that the Zoning Commission would have been powerless to change the zoning of the property because it was zoned A-60 in 1933. Can Poretsky, who contracted to buy the land with the expectation that the zoning status would remain unchanged, successfully urge that it must remain unchanged? The first thing Poretsky did was to try to increase the use of the property over the use permitted by the zoning, and to have an eight-story apartment approved (R. 21). But before that he recognized the possibility of change of zoning, and tried to protect himself by his contract, but the vendors, his co-petitioners now, made Poretsky take the gamble (Rec. 26).

The petitioners also urged *Allen Calculators* v. *National Cash Register Co.*, decided by this Court on May 1, 1944 (petition and brief pages 7-9-14-17 and 21).

The Allen Calculators, Inc., had what the respondents in this case never had, i. e., opportunity to be heard.

This is clear from the following excerpts from the case:

> "Before making his ruling, he was advised, in answer to his inquiry, that the president of the appellant would be called as a witness by the Government. * * *
>
> "The record here discloses that the parties produced all data they and the court thought was available upon the issues in the case. Moreover, the court invited the Government to call the appellant's president to testify as to his knowledge concerning the issues. * * *
>
> "Where, as here, examination of the entire record leading to the court's final order discloses that the issues were thoroughly explored and that the parties were adequately represented, the action of the court denying intervention should not be reviewed."

It is respectfully submitted that the *Allen Calculators* case is not parallel to the case at bar.

The petitioners rely upon *Nectow* v. *Cambridge*, 277 U. S. 183, 72 L. Ed. 842 (Petition and Brief, pages 3 and 13). An inspection of the maps attached hereto will differentiate this case. The building of an apartment house in an otherwise entirely residential section surely has a substantial relation to the public health, safety, morals or general welfare, spoken of in the case cited. This court was aware of the ruinous effects of apartment houses, as it brought out in the case of *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 71 L. Ed. 303, from which the following is quoted:

> "With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a

mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings, created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances."

The court can readily imagine the living room of Maudlin (Rec. 59) facing the back of an apartment house from which is removed the garbage and trash and where the service entrance is contained. The situation as described in the Ambler case above is doubly accentuated in the case of those living on Crestwood Drive. (Rec. 67)

The effect of the judgment of the trial court is to permit an apartment house on 16th Street, north of Piney Branch Parkway, which is the natural dividing line between the multi-family dwelling area to the south and the single family dwelling area to the north. No other apartment house is permitted on 16th Street in the nearly four-mile stretch between Piney Branch Parkway and the District line to the north, except on a small triangle (Rec. 61) which is not large enough for a practical apartment house. The District of Columbia is the capital of the United States, and, in a sense, the capital of the whole world. Beauty and order are important here, and the comprehensive plan of the National Capital Park and Planning Commission for the

development of 16th Street north of Piney Branch Parkway as a residential area should not be frustrated by permitting the erection of an apartment house at the corner of 16th and Shepherd Streets.

In the cited case, *Nectow* v. *Cambridge,* there was a large auto assembly plant south of the locus in question. A soap factory and the tracks of a railroad were near. This court held that the site in question should not be subjected to greater restriction.

In the present case all the area abutting 16th Street is residential north of Piney Branch Parkway, which is a natural boundary. To favor 70/100 with less restriction would afflict the area with a creeping malignancy.

The prayers of the complaint (Rec. 12) not only do an injustice to these respondents, without a hearing, but to the comprehensive plan for zoning of the entire city. (See Map III hereto attached.)

The case of *Russell Sage* v. *Central Railroad Co. of Iowa,* 93 U. S. 412, 23 Law. Ed. 933, represents an instance where intervention was allowed for the purpose of taking an appeal.

> "The appellants were permitted to intervene, but only for the purpose of an appeal. It would have been within the power of the court to set aside the old decree and enter it over again; but this was refused. Leave only was granted to appeal from the decree as originally rendered. * * * The appellants, by the order of January 14th, became parties to the suit for the purposes of an appeal. This order, having been made at the same term in which the decree was entered, was within the power of the court; and although it does not appear whether they were admitted as plaintiffs or defendants, it was sufficient to enable them to prosecute an appeal for the protection of their interests."

The order of January 14, referred to above, was the order permitting Russell Sage et al. to intervene and to prosecute an appeal.

St. Louis and San Francisco Railroad v. *Spiller,* 274 U. S. 304, 71 Law Ed. 1060, presents an analogous situation. In 1913 the Federal Court appointed receivers for a railroad. In 1916 the system was sold. In 1920 Spiller recovered a judgment in the Federal Court for $30,000.00.

> "Thereupon he filed in the receivership suit, upon leave granted, an intervening petition, praying that judgment be satisfied out of the properties so acquired by the new company." (Page 307, Orig. Ed., page 1065 Law. Ed.)

The court said (page 315 Orig. Ed., 1069 Law. Ed.):

> "No good reason is shown why relief may not be had as well upon the intervening as upon the original bill."

The Court of Appeals in a footnote (Rec. 87, note 4) has listed four cases, discussing the rights to intervene in varying circumstances. In one case the plaintiff in a personal injury case was permitted to intervene in a suit for a declaratory judgment brought by her defendants against the Clerk of the Court and the Director of Traffic. (*Champ* v. *Atkins,* (1942) 76 U. S. Appeals D. C. 15, 128 Fed. (2d) 601.)

Was the Judgment of the District Court Denying the Appellants' Motion to Intervene Appealable?

The petitioners have treated this under a slightly different title (Petitioners' brief, page 21 et seq.).

Reliance is had upon *U. S.* v. *California Co-operative Canneries,* 279 U. S. 553, and *Allen Calculators, Inc.* v. *National Cash Register Co.,* decided May 1, 1944, both quoted above.

Each of these cases arose under a Federal statute with respect to appealable orders.

The *Canneries* case arose in the District of Columbia, but the basic act was the Anti-Trust Act. The appeal was apparently a general appeal, not a special appeal as allowed by the District of Columbia statute.

There is a marked difference between the Federal statute (Title 28, Sections 225 and 227, U. S. Code) and the District of Columbia statute (Title 17, Section 101, D. C. Code). In the Federal statute, there is no provision comparable to the appellate jurisdiction of the United States Court of Appeals for the District of Columbia, by which an appeal may be allowed "from any other interlocutory order in the discretion of said United States Court of Appeals for the District of Columbia."

The Appellate Court, on proper petition, allowed the appeal (Rec. 79 and 80), and when the matter came on for final hearing, reversed the order (Rec. 87).

It is respectfully submitted that this practice is permissible under the District of Columbia statute.

An Attempted Interference With Administrative Remedies

Since the decision in *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 71 Law. Ed. 303, which was the parent of most zoning cases, there has been a remarkably liberal advancement in administrative remedies. The tendency has been to leave questions of fact to administrative agencies where they are vested with jurisdiction at law to decide them.

Certain sections of the zoning law are cited in the opinion of the court below (Rec. 86 and 87). Title 5, Sec. 413 D. C. Code confers power and jurisdiction upon the Zoning Commission to regulate, "the location, height, bulk, number of stories and size of buildings and other structures * * * and the uses of buildings, structures and land * * * and for the purpose of such regulations said commission may divide the District of Columbia into districts and zones."

The following cases held that the court will not interfere with the administrative remedies:

Myers v. *Bethlehem Ship Building Corporation*, 303 U. S. 41, 82 Law. Ed. 639.

Newport News Ship Building Corporation v. *Schauffer*, 303 U. S. 54, 82 Law. Ed. 646.

U. S. v. *Los Angeles and Salt Lake Railroad,* 272 U. S. 299, 71 Law. Ed. 651.

Morgan v. *Hines,* 72 App. D. C. 331, 113 Fed. (2d) 849.

Federal Power Commission v. *Metropolitan Edison Co.,* 304 U. S. 375, 82 Law. Ed. 1408.

Switchmen's Union v. *National Mediation Board,* No. 48 Supreme Court United States, Nov. 22, 1943—Co-op Ed. page 89.

General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Pacific Lines of Southern Pacific Company v. *Southern Pacific Company, et al.,* Nos. 27 and 41—Nov. 22, 1943—Supreme Court U. S. Co-op Ed. page 112.

General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Missouri-Kansas-Texas Railroad, an Unincorporated Association v. *Missouri-Kansas-Texas Railroad Company, et al.,* Supreme Court of the U. S. No. 23, Decided Nov. 22, 1943—Co-op Ed. page 104.

Engineers Public Service Company, et al. v. *Securities and Exchange Commission,* No. 8394, in the U. S. Court of Appeals for D. C., Nov. 22, 1943.

CONCLUSION

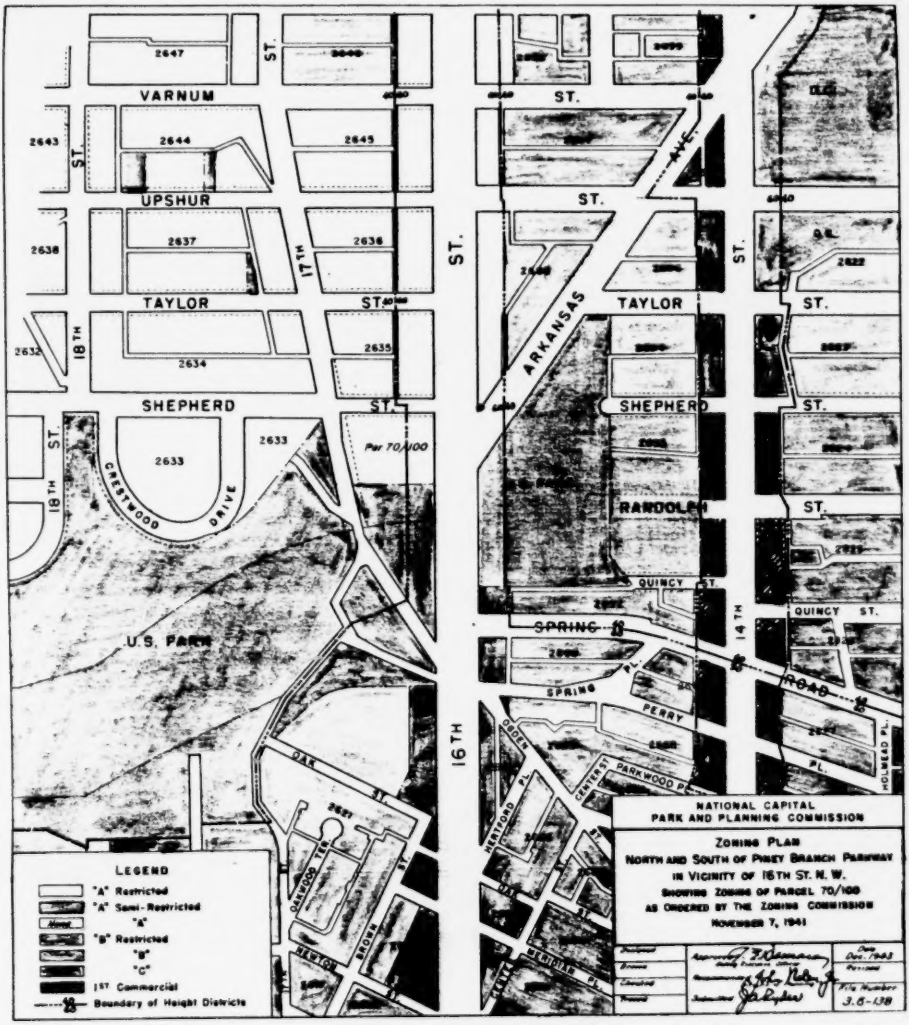
It is respectfully submitted that the equities of this case are strongly with these respondents. The owner of land in a fine residential area of Washington and a contract purchaser of that land, knowing from the nature of things that an apartment house would be ruinous to the beauty of the city and the neighborhood in particular, entered into an aleatory contract, and ask the court to enforce it. It seems proper that this court should say to the contract purchaser, as this court said in the *Euclid-Ambler* case, *supra,*

"Sic utere tuo ut alienum non laedas."

It is urged that certiorari be denied.

Respectfully submitted,

H. Winship Wheatley,
1010 Vermont Ave., N. W.,
Washington, D. C.,
Attorney for Respondents.

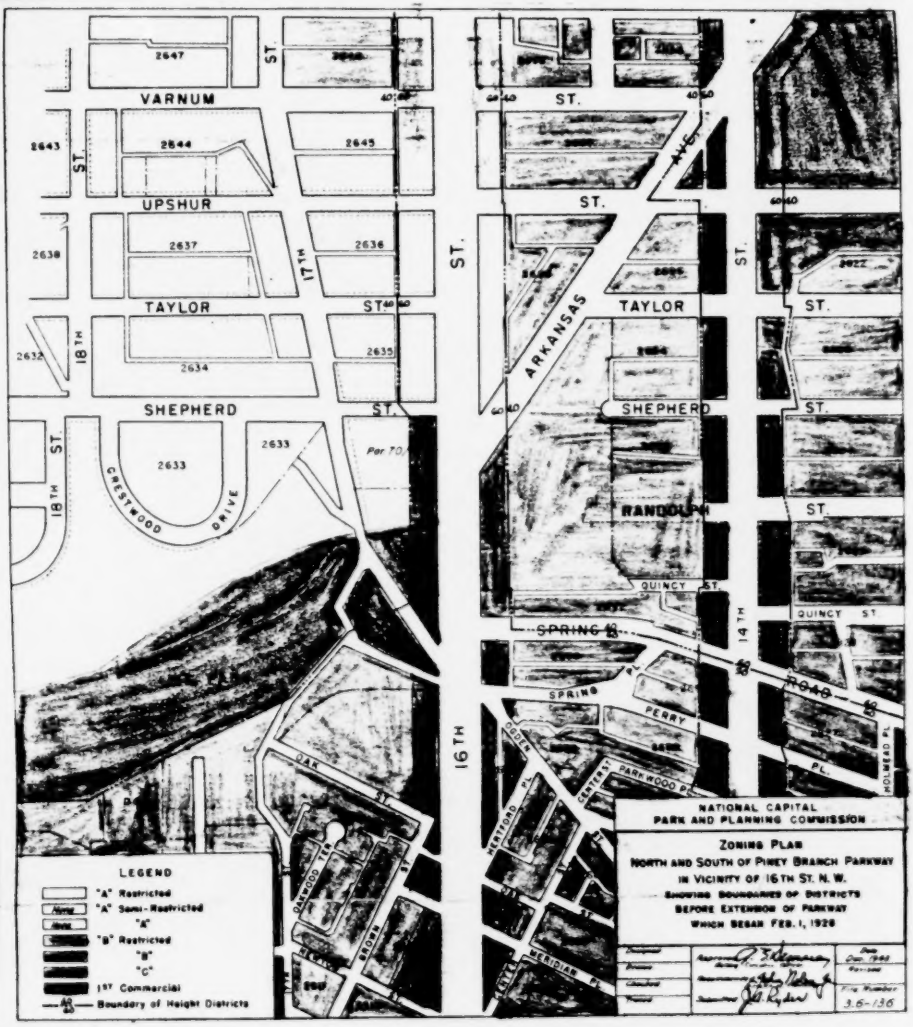


MAP. II. Same Portion of Zoning Plan of the District of Columbia After Enlargement of Piney Branch Parkway

RESPONDENTS' NOTE

Under the Zoning Regulations of the District of Columbia apartment houses cannot be built in "A" Restricted, "A" Semi-Restricted, or "B" Restricted areas. Dwellings in such areas may be only of the single-family type.

The above portion of the zoning plan of the District of Columbia, after the enlargement of Piney Branch Parkway, shows that after the Parkway had been enlarged that it became the logical dividing line between the single-family dwelling area to the north and the multi-family (apartment house) area to the south. It is obvious that Parcel 70/100 belongs to the single-family dwelling area which extends to the north and west of Parcel 70/100 and embraces all of the area in the vicinity of Sixteenth and Shepherd Streets north of Piney Branch Parkway. It shows a comprehensive zoning plan as determined by the Zoning Commission after the enlargement of Piney Branch Parkway and the major improvements made in 1939 and 1940.

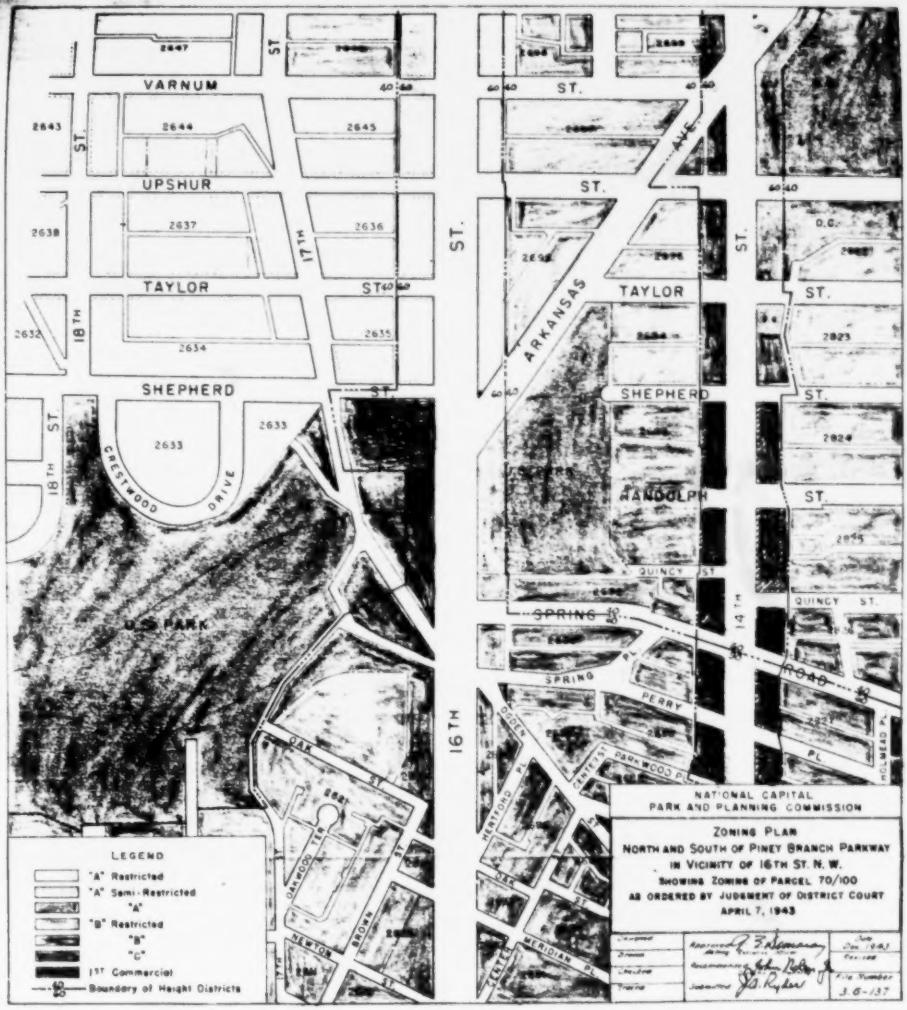


MAP I. Portion of Zoning Plan of the District of Columbia Prior to Enlargement of Piney Branch Parkway

RESPONDENTS' NOTE

Under the Zoning Regulations of the District of Columbia apartment houses cannot be built in "A" Restricted, "A" Semi-Restricted, or "B" Restricted areas. Dwellings in such areas may be only of the single-family type.

The above portion of the zoning plan of the District of Columbia, prior to the enlargement of Piney Branch Parkway, shows a comprehensive zoning plan under the conditions existing at that time (1928) with Shepherd Street as the dividing line between the single-family dwelling area to the north and the multifamily (apartment house) area to the south. Development of the area immediately north of Piney Branch Parkway, which is known as Crestwood, was not commenced until late in 1937.



MAP. III. Same Portion of Zoning Plan of the District of Columbia as it Would be if the Lower Court is Sustained

RESPONDENTS' NOTE

Under the Zoning Regulations of the District of Columbia apartment houses cannot be built in "A" Restricted, "A" Semi-Restricted, or "B" Restricted areas. Dwellings in such areas may be only of the single-family type.

The above portion of the zoning plan of the District of Columbia, as it would appear if the lower court is sustained, shows the introduction of a multifamily (apartment house) spot into a single-family dwelling area, and the breaking down of a neighborhood of single-family dwellings, as established by the Zoning Commission, along and west of Sixteenth street and north of Piney Branch Parkway. This is patently spot zoning.

EXHIBIT IV.

Copy October 7, 1941

MINORITY REPORT OF THE ZONING ADVISORY COUNCIL.

CASE #2 OCTOBER 8, 1941 HEARING

Application of C. V. Maudlin, et al. requesting an amendment to the zoning map by change from Residential, 60' "A" Area to Residential, 40' "A" Restricted Area parcel 70/100, located at the southwest corner of 16th and Shepherd Streets, N. W.

The present apartment house zoning of this 2.07 acre tract at 16th and Shepherd Streets is by no stretch of the imagination a part of any comprehensive plan as the zoning law requires. It is in fact an outstanding case of spot zoning and constitutes an opening wedge for further apartment house zoning north of this point.

While the original zone plan of 1920 may have had some basis for its adoption, conditions have materially changed since this plan was formulated. As it is the duty of the Zoning Commission to keep this plan up to date, the new conditions are sufficient reason for the Zoning Commission to modify the original plan to conform. Of most importance perhaps is the fact that Piney Branch Parkway has been considerably widened and extended in the last 13 years at a considerable expenditure of public funds, definitely separating the private development north and south of the Parkway at 16th Street. South of the Parkway the zoning and development has been consistently and properly of the multi-family type. North of the Parkway to the District Line the development is entirely detached single-family residence of the most restricted character, *with the sole exception of the parcel in question*, which is thus granted a special privilege not enjoyed by any other property owner north of Piney Branch Parkway.

There are ample court decisions supporting the right of zoning authorities to change any unimproved property from a less restricted to a more restricted classification, if conditions change and it is necessary to the maintenance of the comprehensive character of the zone plan. In this case the enlargement of Piney Branch Parkway has made it a

definite physical barrier between the multi-family develop-mnt to the south and the subdivision and development with single family detached homes of acreage property in the Crestwood section immediately to the north and west.

It is therefore recommended that the zoning of Parcel 70/100 be changed to "A" Restricted, with the 16th Street frontage in the 60′ height district and the rear portions in the 40′ height district, following the same plan as prevails for several miles to the north of this parcel.

(s) JOHN NOLEN, JR.

EXHIBIT V.

NATIONAL CAPITAL PARK AND PLANNING COMMISSION.

Interior Building,
Washington, D. C.

April 19, 1943.

The Zoning Commisison,
District Building,
Washington, D. C.

Gentlemen:

At the meeting of the National Capital Park and Planning Commission on April 16, the attention of the Commission was drawn to the decision of the District Court of the United States for the District of Columbia in civil action No. 14606, that the rezoning of the property owned by Harry Poretsky at 16th and Shepherd Sts. N. W., was void and should be vacated and set aside.

In the opinion of the Commission this decision constitutes a definite threat to the principles of comprehensive zoning and city planning, and to the powers of the Zoning Commission to make changes in the zoning plan from time to time as conditions change in the various parts of the city. The Commission urges that all practical means be adopted to obtain a reversal of this decision.

The action of the court appears to conflict with many of the provisions of Section II of the Zoning Act of June 20, 1938, as a reading of this section will reveal. The decisions of the higher courts in zoning cases are so frequently based on the fundamental relation of the issue to a comprehensive

plan, that it would be reasonable to expect that if this phase of the case in question were stressed in an appeal, an entirely different decision might be obtained. Certainly the desire to make the plan for 16th Street comprehensive, and to encourage the stability of the "A" Restricted district and of the land values therein, was a controlling motive in the action taken by the Zoning Commission in 1941. The decision of the Court apparently gives no weight to these motivations, so clearly stated in the law.

Your attention is also directed to several statements in the decision which are open to question as matters of fact. For example, it is stated that the property had been assessed for taxation on a valuation based on its availability for the erection of an apartment building though the records show that there has been no change in the assessment since 1930 when more than 2/3 of the property was in the "A" Restricted district. Furthermore, it is stated that this property is situated at the foot of a hill, when as a matter of fact most of it is above the grade of the adjoining streets. Another point, which it is in the power of the Zoning Commission to correct, is that the property immediately across 16th Street is zoned for apartments. The failure to remove this very small, detached and illogical residue of the former "C" Area district at the same time the Poretsky property was changed is, of course, unfortunate, but a condition that could be remedied readily by the Commission. One piece of spot zoning should not be allowed to justify another.

This Commission will be glad to cooperate in this matter if it can be of any assistance.

Sincerely yours,

U. S. Grant, 3rd,
Major General, U. S. Army,
Chairman.

JN:HL
CC:Mr. Demaray.

EXHIBIT VI

IN THE SUPREME COURT
OF THE UNITED STATES.

OCTOBER TERM, 1944

No. 579

HARRY PORETSKY, ARTHUR W. MACHEN, Trustee, and THOMAS MACHEN, *Petitioners*,

v.

JULIUS H. WOLPE ET AL., AND CHARLES W. KUTZ, ET AL., as Members of the Zoning Commission of the District of Columbia, *Respondents*

STIPULATION

It is stipulated between counsel that the date May 8, 1943, appearing at the top of the proposed intervening petition on page 57 of the printed transcript, is a printer's error and that it should be May *6*, 1943. The date on the transcript filed in the Court of Appeals is indistinct but counsel have verified the date from the docket of the trial court and the date is May *6*, 1943. The docket in the trial court shows that the proposed intervening petition was filed at the same time that the motion for leave to intervene was filed.

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